

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESALE PRICE)
LITIGATION)
) MDL No. 1456
)
) Civil Action No. 01-12257-PBS
THIS DOCUMENT RELATES TO:)
) Hon. Patti B. Saris
United States ex rel. Edward West v. Ortho-)
McNeil Pharmaceutical, Inc.)
)
Subcategory Docket No. 06-12299-PBS)
)

**MEMORANDUM IN SUPPORT OF DEFENDANT'S RULE 25(a)(1) MOTION
TO DISMISS DUE TO DEATH OF RELATOR**

Defendant Ortho-McNeil Pharmaceutical, Inc., n/k/a Ortho-McNeil Pharmaceutical, LLP (“OMP”) moves for dismissal pursuant to Federal Rule of Civil Procedure 25(a)(1). That rule states, in pertinent part:

Rule 25. Substitution of Parties

(a) Death.

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1).

Relator Edward West died sometime between November 4 and November 10, 2008. OMP filed a “Statement Noting The Death of Relator Edward West” on December 8, 2008 (Docket No. 5746). The 90 day time period for filing a motion for substitution ended on

March 11, 2009. However, as of the date of this filing, no “successor or representative” of West has filed a motion for substitution. Accordingly, “the action by . . . the decedent must be dismissed.” Fed.R.Civ.P. 25(a)(1). See, e.g., Rohlman v. Florida, No. 3:08cv182, 2009 WL 36456, at *1 (N.D. Fla. Jan. 5, 2009); Walsh v. City of Chicago, 712 F.Supp. 1303, 1306 (N.D. Ill. 1989).¹

WHEREFORE, defendant Ortho-McNeil Pharmaceutical, Inc. respectfully requests that the Court dismiss the decedent Edward West’s claims against it pursuant to Federal Rule of Civil Procedure 25(a)(1).

Date: March 25, 2009

Respectfully submitted,

ORTHO-MCNEIL PHARMACEUTICAL,
INC.

By: /s/ Scott D. Stein
One of Its Attorneys

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¹ Because it is not necessary to resolve the instant motion, OMP expresses no view concerning whether West’s claims under the False Claims Act were extinguished by his death.

CERTIFICATE OF SERVICE

I, Brad Robertson, certify that on March 25, 2009, I electronically filed the foregoing document with the Clerk of the Court for the District of Massachusetts using the court's CM/ECF system. A copy of the foregoing also has been served on the following individuals by depositing a copy in the U.S. mail, first-class postage pre-paid:

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